IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, TRUSTEE, ET AL.,

vs.

AMERICAN NATIONAL BANK ET AL.

REPLY BRIEF OF PLAINTIFFS IN ERROR, WILBERFORCE SULLY, MRS. MARY P. MYTON, AND ALFRED B. CARHART, TO THE BRIEFS AND ARGUMENTS MADE BY DEFENDANTS IN ERROR.

It is insisted in the brief filed by defendants in error, represented by S. C. Williams, that neither A. B. Carhart, Wilberforce Sully, nor Mrs. Mary P. Myton are citizens of other States than Tennessee. In addition to the argument made upon this question in our original brief, we desire to submit the following considerations:

I.

A. Such citizenship, to wit, "non-residents within the meaning of the act of 1877," as construed by this court in

the case of Blake *vs.* McClung, 172 U. S., is admitted in the stipulation, as before shown. It is no answer to this admission, which is well known to counsel, that the meaning of non-resident, as defined by the act of 1877, was given in the case referred to, as the same counsel were in it as are on briefs filed for defendants in error, and were familiar with that definition, and agreed to that stipulation, as a matter of fact, in order to save going through the record for the purpose of showing all the facts as to citizenship. It is too late now for them to be heard to question the fact admitted in the stipulation.

B. As showing how counsel on both sides regarded residence and citizenship, and how the same were treated from the beginning to the end of this record as identically the same as that held by the court and in the brief of counsel for general creditors in this cause, said brief being filed by Solicitor E. J. Baxter, and there being upon said brief Deaderick & Epps, the counsel who, with E. J. Baxter, filed the original general creditors' bill in this cause, and who are the representatives of general creditors, we quote from brief here filed by counsel for general creditors on page 7 as follows:

"They (referring to plaintiffs in error) are citizens of the State of New York, contracting under the laws of New York, and with the view of having the debt paid at the office of the company in New York."

No point is made in this brief, filed for general creditors *in solido*, that plaintiffs in error or E. C. Manning are not citizens of the State of New York, as agreed in the stipulations.

C. It is further contended by counsel for "certain defendants in error," represented by counsel, S. C. Williams, that they cannot be precluded by their failure to introduce proof

in trial court to negative citizenship of Carhart, Sully, and others for the reason that no question was made in the court below which would call for the relevancy of such proof. This is only a manifest error of said counsel, although nothing is shown as to that in the stipulated record except the use by counsel of the terms "citizenship" and "residence" as meaning the same thing as referred to in our original brief, but as counsel herein for defendants in error has stated that the point was not made in the lower court, we respectfully refer the court to page 1853 of volume 6 of the transcript, which shows that the question as to the violation of the Federal Constitution was made in chancery court in exceptions to the report of the master allowing priority to Tennessee claims, so that if counsel desired then to contest the question of citizenship, as averred and understood between all counsel in the case, as shown in our original brief, opportunity was given and declined.

II.

As to Residence and Citizenship of E. C. Manning, Assignor of Wilberforce Sully.

It is insisted by counsel for "certain defendants in error" that there is no averment or proof of the residence of E. C. Manning. We admit that in the stipulated record no proof nor averments in the general transcript are called for, but it was certainly understood and agreed to in the stipulations, page 177, printed Record, as follows:

"It is further stipulated that neither Wilberforce Sully, trustee; A. B. Carhart, Mrs. Mary P. Myton, nor E. C. Manning proved nor attempted by any evidence to show in what jurisdiction they were citizens respectively. *Each of them* did prove their respective residences to be as indicated above."

Now, the words "indicated above" mean that there are somewhere in the stipulations the residences of these parties set out. On page 144 of the stipulations their residences are set out as New York, except that it says, "Wilberforce Sully, assignee of E. C. Manning, New York."

Inasmuch as the stipulations first call to the attention of the court the fact that the residence of E. C. Manning was shown in the statement, we take it to be conclusive that such residence of E. C. Manning, within the meaning of the act of 1877, as called for in the stipulations, page 144, was New York. But counsel insists that the record not stipulated for shows that E. C. Manning was a resident of the District of Columbia, and that such residence gives no constitutional rights to such party within the meaning of section 2, article IV. If the court went into the original record—which we understand that it has the right to do, but with no obligation resting upon this court so to do—and such is the fact as to the residence of such party—then we insist that under section 2, article IV, such resident is a citizen of another State within the meaning of said constitutional provision, and to protect such a constitutional right of equal privileges and immunities under the laws of the United States the word "State" should be construed to mean all of the States and Territories of the United States. Each party is equally a citizen of the U.S. within the meaning of Clause 1 Sec. 1. XIV amendment. III.

It is also insisted by counsel for "certain defendants in error" that each of these debts due to the general creditors—Sully, as assignee of Manning; Mrs. Myton, and A. B. Carhart—are not shown in the record to have been contracted prior to the registration of the mortgages. This is true as to the stipulated record, but said debts had been contracted before, as shown in the transcript, and no stipulation in regard to it was made, because so well known to counsel, and no point on the same was made in the brief for general cred-

itors, defendants in error. It is true that in the petition of Mrs. Myton and Carhart setting up their unsecured claims in the chancery court at Johnson City, Tennessee, they set out the date of the note which they held. This note, however, was given in renewal of other indebtedness due from the Carnegie Land Company to said parties which had been taken up, but the date of contraction of the original debts is shown in the transcript as follows, antedating said mortgage registration by four months:

As to Mrs. Myton, Original Transcript, pp. 777 and 780, vol. 3.

As to A. B. Carhart, Original Transcript, p. 779, vol. 3.

Note filed with petition of Carhart and Myton was a renewal of note dated October 26, 1892, as reported by master and unexcepted to.

Original Record, vol. 3, p. 926.

The Manning debt is also shown to have been created before the registration of both of the said mortgages, to wit, on the 22d of March, 1890.

Report of master, Original Transcript, p. 925, vol. 3.

As to Mortgagee A. B. Carhart.

In answer to the proposition advanced in our original brief that plaintiffs in error, Carhart and Sully, trustee, have been deprived of immunities given to residents and citizens of Tennessee under article 2, section IV, of the Constitution of the United States, defendants in error insisted that the act of 1877, chapter 31, does not give to Tennessee mortgagees any immunities not granted to plaintiffs in error, and it is their argument that under said act of 1877 Tennessee creditors have to submit to a priority in favor of all debts contracted to Tennesseeans prior to the date of the

registration of said mortgage or taking of any judgment in favor of such Tennesseeans upon several grounds:

1. It is insisted at page 19 that their construction, which would subject all mortgagees alike, would be more consonant with justice. That argument comes with poor grace, when, if it be true, it would follow that justice would treat alike all resident as well as non-resident citizens, which manifestly was not the view taken by the legislature. If the legislature, therefore, had the idea to make a discrimination in favor of residents of Tennessee as against non-residents and citizens of other States, as they unquestionably did do, why did they not also make and intend to make this discrimination in favor of resident mortgagees as against non-resident mortgagees, which they likewise did, as we insist?

2. The next point contended for is that our construction of said act would make the statute work absurd results, for the reason it is said that the bonds issued upon the mortgage would go out upon the market, and the rights of any holder of said bonds would depend upon the fact as to whether the original purchaser of such bonds was or was not a resident of Tennessee.

This argument is in like position with the other, the act itself making that very inconvenience with respect to all other debts as well as to bonds secured by mortgages or debts secured by judgment. In other words, as to a note issued by said corporation payable to bearer, if presented for payment in the state of such corporation thereafter, the holder of said note, a simple contract debt before being entitled to the status of a Tennessee creditor, would have to prove that the first owner of said paper was a resident of the State of Tennessee, so that this argument of defendants in error comes to nought under the plain language of said act, it being as easy to locate and prove the first holder of bond as of such a note.

3. The third ground insisted on is that there are counter acts of Tennessee which may be looked to in aid of the construction as follows: The act of 1873, by which railroad mortgages, regardless of whether made to Tennesseeans or others, were subordinated to debts antedating and postdating such mortgages, and also the act of 1877, providing that claims for materials furnished and damages done in the operation of the road should have priority over any mortgage issued by such railroad company.

In answer to this we insist that such acts, instead of being an argument for the construction contended for by the defendants in error, are very much in favor of the construction contended for by plaintiffs in error, in this, that the acts of 1873 and 1877 referred to make no distinction whatever between claims of residents of Tennessee and residents of other States or citizens of Tennessee and other States as to priority over mortgage, but in giving a preference over the mortgage the preference is given alike to the claims, having no reference whatever to the residence or citizenship of the claimants. It would therefore make no difference, as no such purpose is manifest in the act to give a preference to Tennesseeans over others, that any construction could be called for making any distinction between the persons who hold the mortgage. In said case the purpose manifestly is to protect the claim regardless of residence or citizenship, while in the act at bar the intention is to protect creditors of Tennessee and not the character of the claim, and the character of the claim has nothing whatever to do with the question. The purposes of the two acts essentially differ—one always discriminating, the other never.

4. The next objection urged is that this court will adopt such construction of said statute as will uphold it as constitutional.

This is true, but where the construction insisted on by counsel makes the act evidently in violation of the constitu-

tion of Tennessee, as shown by the decisions of Tennessee, then the object of this court is to so construe said act as to make it, first, in harmony with the constitution of Tennessee, that being more obviously within the scope and in the mind of the persons passing the act. This court will not grant a construction to make it violate the Constitution of the United States, but in looking at the act, when they find out that the construction insisted on by the other side would certainly make it in violation of the constitution of Tennessee, they will give it a construction which will make it harmonious with the constitution of Tennessee, even if the effect of it is to preserve the rights of the plaintiffs in error in consequence of said act violating the Constitution of the United States.

5. Counsel for "certain defendants in error" next insist that this statute was construed by the State courts to grant the prior lien of the mortgage or judgment against all debts which may have been incurred subsequent thereto, and to deny such priority of lien only (not the debt in its original status) to their mortgages or judgments as respects antecedent debts. This contention of defendants in error works a plain absurdity, and the State courts made no such construction nor determination, and the illustrations given of such application are entirely misstated by counsel. Such contention was not made at the bar in fact, nor does it appear at any step of the proceedings of this case—stipulated record or transcript—and such was not the construction of said act by the court nor by any of the counsel in this case, nor was it insisted on, as is shown by the stipulated record. Such an absurd contention is negatived by the plain language of the statute itself. The language of the act is that "creditors who may be residents of this State shall have a *priority* in the distribution of assets," etc., "to the payment of debts over all simple contract creditors, being residents of any other country or

countries, and also over mortgage or judgment creditors for all debts, engagements and contracts which were made or owing by said corporations previous to the filing," etc. If counsel's contention is correct, the debts due to residents of Tennessee would not have a priority over mortgage creditors, but would simply share with mortgage creditors in the event such mortgage creditors' debts antedated the mortgages taken to secure the same. And in such event the act would read, that creditors who may be residents of this State, etc., should have an equal right to distribution with any mortgage or judgment creditors as to debts contracted before registration of such mortgage, not a "priority" over such mortgage creditor, but the act is otherwise expressly. Again, such a construction would lead to the most fraudulent results if it should be placed upon said act by this court or the courts of Tennessee, and must therefore not be presumed, because if a creditor who takes a mortgage has still the right to share equally with those creditors whose debts antedated his mortgage or judgment, or the judgment taken by him, if his debt antedates his mortgage, as is nearly always the case, every creditor would immediately, as soon as his debt was contracted, either take a mortgage or a judgment, for even if his mortgage or judgment were not valid, by taking it, he would make a class of Tennessee creditors, created before the date of his judgment, in which he would share, and the sooner his judgment was taken the more limited would be the number of such creditors sharing with him.

If this construction had been made by the courts of Tennessee, there would be a number of different classifications not made in said decree:

1. There would be a class who took prior to the registration of the first mortgage.

2. There would be a class who took prior to the registration of the second mortgage.

3. There would be a class between the second mortgage and the first judgment taken, even though such judgment were in favor of a Tennessee creditor; but, as a matter of fact, there only being mortgages in favor of non-resident citizens, the classification was simply made with reference to the mortgages, and no classification was made with respect to the judgments whatever, and nowhere in any of the decrees of the court of chancery appeals or the supreme court has the question as to the time of maturity of the mortgage debts or judgment debts cut any figure or been referred to except in the case of Jarvis, King, and Maden and wife, which present entirely different questions, and will be referred to hereafter.

By reference to the first decree pronounced in the chancery court at Johnson City, Tennessee, it will be seen that the chancellor made the following classes of claims:

1. After the payment of costs, taxes, &c., should be paid "all debts contracted prior to November 23, 1891, and due residents of Tennessee," November 23, 1891, being the date of the registration of the mortgage of the Travelers' Insurance Company on the hotel property, a part of the property of the Carnegie Land Company.

2. "All debts due residents of Tennessee contracted after November 23, 1891, and before February 10, 1893," the latter date being the date of the Carhart mortgage.

3. "Creditors, residents of Tennessee, whose debts were contracted after February 10, 1893," this last class taking without reference to judgments or otherwise, for the reason that, as will be more fully shown, the judgments being in favor of Tennessee creditors, the court either construing said act not to give a preference over such judgments, or else the judgment being taken after the Carnegie Land Company made a general assignment, and after its property

had become a trust fund for creditors, the judgment was of no effect as to creditors of said company or any one else.

4. "Non-residents of Tennessee by simply contract." (Printed Record, Tr., p. 45.)

This decree fixing this classification was not modified by any subsequent decree by the court of chancery appeals or the supreme court of Tennessee.

It will be noted further that no such claim as is made by counsel for "certain defendants in error" is made by counsel for general creditors in this cause. It will now be noted that the judgment in favor of H. C. Jarvis was taken on September 15, 1895. If this judgment in favor of this Tennessee creditor (the other two judgments in favor of King and Maden having likewise been taken after the general assignment was made by the Carnegie Land Company) had the effect the same as the taking of the mortgage in favor of Carhart or the Travelers' Insurance Company, there would have been a decree allowing all creditors whose debts were contracted between the date of the Carhart mortgage, February 10, 1893, and September 15, 1895, the date of the Jarvis judgment, to be paid ahead of any other debts to resident Tennesseeans, after the date of said Jarvis' judgment, and so likewise as to the judgments in favor of King and in favor of Maden and wife. As to the date of the Jarvis judgment, see printed Record, page 80.

This contention of counsel for "certain defendants in error" is made for the sole reason that it is known that the mortgage bonds of Carhart were taken, of course, after the mortgage was registered, although it might have the effect to put Carhart's indebtedness previously contracted in the same class as Tennessee creditors whose debts were contracted previous to that time, which, however, would be in the face of the plain language of said act, but it is insisted by counsel for "certain defendants in error," though not so

insisted by counsel for the general Tennessee creditors, that the court below actually construed said act as claimed by said counsel in the case of H. C. Jarvis, a Tennessee creditor who recovered judgment, as before stated, in 1895, and the quotation is made from the decree of the court of chancery appeals, which, without its context and without knowing the point which was under discussion by the court at the time, would give color to such contention; but when the decree of the court is read as to said claim and the point which was made against said claim is understood, it is manifest that the court was simply passing upon the assignment of error which had been made affecting the priority of said claim as being prior in right to the mortgage of the Travelers' Insurance Company. There is only one assignment of error attacking the decree of the chancellor allowing Jarvis' priority as a Tennessee creditor over the mortgage of the Travelers' Insurance Company, and that was the assignment made by the Travelers' Insurance Company itself.

Transcript, pp. 97, 98.

The Travelers' Insurance Company insisted that the Jarvis claim was not a debt against the Carnegie Land Company at the time the mortgage to the Travelers' Insurance Company was executed, because Jarvis in his cross-bill had only sued, it insisted, for five hundred and seventy-five dollars ($575), and yet a decree was granted him for $2,236.50; that an appeal had been prayed to the supreme court of Tennessee by the Carnegie Land Company, and afterward the appeal was dismissed and an agreed decree entered in favor of Jarvis for the sum of $1,800. It was insisted by the Travelers' Insurance Company that decree, at most, for $1,800 could only be good between Jarvis and the Carnegie Land Company, it being entered September 15, 1895; that the Travelers' Insurance Company was not joined in that case, and therefore could

not be bound. It was further insisted that the Travelers' Insurance Company had more than two years before made a general assignment, and all its affairs were then being wound up under a general creditors' proceeding. It will be borne in mind that it was not insisted that the act did not give Jarvis a right to his claim prior to the Travelers' Insurance Company, provided his debt was created before the time the mortgage was registered, but that the debt then was only $575, and yet the decree was thereafter rendered for $1,800, and was entered after the general assignment of the company, and it was claimed by the Travelers' Insurance Company that the decree was inoperative in fixing the amount at $1,800. In answer to this contention, the court of chancery appeals said that Jarvis purchased lots from the Carnegie Land Company in 1890, which was before the mortgage to the Travelers' Insurance Company; that at that time his right of action accrued on account of the fraud practised against him, which right of action culminated in the judgment for $1,800 after the property of Carnegie Land Company had become a trust fund for its creditors. The court of appeals say it was argued before them that in his cross-bill he only claimed $575. In this connection the court say that the real difficulty is over the contention whether the debt should be treated as of the date of his decree or as of the date of his right to recover. In other words, whether the debt should be for $575 or for $1,800. It was not insisted then by the Travelers' Insurance Company in their assignment of error, nor by the court, that his judgment taken after the general assignment had any effect whatever upon the proceedings; but, on the contrary, the court construed it as simply a question as to what was the amount of the debt, whether the debt fixed by the decree was the true original debt and as such entitled to priority over the Travelers' Insurance Company.

The contention now made by the defendants in error was not made by the Travelers' Insurance Company nor passed

on by the court. As to the case of Frame King, it stands upon exactly the same basis, and on similar exceptions taken thereto the chancellor decided against the King and Maden and wife claims due Tennessee creditors, on the ground that "the rights of the parties were founded on obligations made and entered into after insolvency." The question was whether the claims were created prior to the making of the Travelers' Insurance Company and Carhart mortgages or were the claims created after that. The judgments taken were not factors in either case, they being clearly taken after insolvency.

Dec. of chan., Pr. Rec., p. 44.

This whole matter is treated fully in the decree of the court of chancery appeals.

Pr. Rec., pp. 81, 82, 83.

The court there say that Preas' exceptions to the decree of the chancellor were well taken, on the ground that the Preas debt was created on December 11, 1891, before the registration of either of the mortgages, and that these transactions were all prior to the assignment of June 3, 1893, by the Carnegie Land Company, and that there was no debt created after those mortgages in favor of Preas and King, but that it was the same debt upon which the original liability was based. The fact that judgment was taken after insolvency and that there was a suretyship entered into after the insolvency is expressly here stated by the court to be immaterial.

Pr. Rec., pp. 82, 83.

The same state of facts also exists as to the claims or judgments in favor of Maden and wife. The exceptions made by the Travelers' Insurance Company alone to the report of the master allowing this as a claim as a Tennessee creditor were twofold:

1. That as the land on which Maden and wife claim their lien had been bid in by them at a price which satisfied their claim, they had no claim.

2. That the debt was created after the insolvency of the company, and therefore that the claim was founded upon an obligation entered into after insolvency.

Upon these contentions the court of chancery appeals passed in practically the same way as on the judgments in favor of Preas, King, and Jarvis.

It is also insisted in said brief of counsel for "certain defendants in error" that the construction of this statute contended for by defendants in error would grant to the residents of Tennessee who have reduced to judgment a demand of a foreign corporation contracted with Carnegie Land Company priority over residents of Tennessee. We insist that it would have no such effect, but that it would have the opposite effect, for the reason that a demand of a foreign corporation contracted with a corporation doing business in Tennessee and transferred to a resident of Tennessee would not give priority to such resident of Tennessee, because such resident of Tennessee would take the status of the Virginia corporation, which, under the act of 1877, has no priority whatever. The claim of the Carnegie Iron Company, assigned to A. R. Wing, has no bearing on the question, for the reason that this assignment to A. R. Wing was made after the Carnegie Land Company became insolvent, and Wing, as assignee, was denied a preference for the sole reason that, as assignee, he stood in the shoes of the foreign corporation, which, under the act, had no preference whatever.

It is not insisted by us and it would be ridiculous to say that because the assignee of the foreign corporation happened to be a Tennesseean such Tennesseean would have any different right than such foreign corporation.

VI.

It is next insisted by counsel that there were no resident mortgagees before the supreme court of Tennessee, so as to call from that court any construction of this statute as to their rights and so as to deny privileges and immunities to non-resident mortgagees while granting them to the former. It is true that there were no resident mortgagees before the court, but it is also true that there were non-resident mortgagees and citizens before the court, and that by the enforcement of the act in question these non-resident mortgagees were denied rights and immunities which should have been granted to them under the Constitution of the United States, the said act properly construed denying such privileges and immunities to non-residents while granting the same to resident mortgagees, whether they were before the court or not. The ground on which the supreme court based their holding that plaintiffs in error were not entitled to the benefit of their mortgage is a matter well known to this court from the record in the case of Blake *vs.* McClung. It is true that that record is not evidence in this cause, but the decisions of the supreme court of the State, whether evidenced by duly printed books or by the written opinion or by their decrees, are matters open to and known to all, as matters of enunciated law, and of which all courts will take knowledge when brought before them, not, however, as evidence, but on the other ground.

For that reason it is known to this court that the supreme court of Tennessee decided against plaintiffs in error and all residents and citizens of other States on the ground solely that a State in admitting a foreign corporation to do business in it had the right to place any terms thereon which it deemed proper to impose, and that said court held in the cause of Blake *vs.* McClung, as well as in the cause at bar, that the State had the right to make any discriminations in favor of its own citizens and residents as against citizens

and residents of other States, whether such citizens and residents were mortgagees or simple contract creditors. Said court, being of that opinion and having so decided in this cause, had enforced said act against plaintiffs in error, and it is now the duty of this court, as we insist, to construe said act and to say what are the rights that are given under it to Tennessee mortgagees—whether those rights were determined by the supreme court of Tennessee or not—and when such rights of Tennessee mortgagees are determined by this court to say whether the supreme court of Tennessee in enforcing said act are depriving plaintiffs in error of a privilege and immunity by said act given to residents and citizens of Tennessee. It is not, therefore, a moot question, as insisted by counsel for "certain defendants in error." On the contrary, it may have been unnecessary for the supreme court of Tennessee to decide what right and immunity was granted to resident mortgagees, inasmuch as they excluded plaintiffs in error from participation on the broad ground that the Constitution of the United States in the particulars complained of here was not violated, as the State had the right to do the very act which it did, regardless of what privileges or immunities were granted to residents of Tennessee. The Federal question was passed on by the supreme court of Tennessee when the act was enforced in the teeth of the exceptions made by plaintiffs in error; and even if the supreme court of Tennessee did construe said act against plaintiffs in error—which is not true as to those rights and immunities granted to resident mortgagees of Tennessee—still we insist that this court has the right to make an independent construction of said act for itself, as the supreme court of Tennessee can no more by construction deprive plaintiffs in error of a constitutional right which this court thinks plaintiffs in error have than the legislature has so to do. As was said by this court in the cause of Yick Wo *vs.* Hopkins, wherein

was involved the constitutionality of certain ordinances of the supervisors of the county and city of San Francisco:

"The determination of the question whether the proceedings under these ordinances, and in enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

118 U. S., p. 356.

In the above case the Supreme Court overruled the construction given said ordinances by the supreme court of California and declared them unconstitutional.

The following cases, we insist, support the contentions of plaintiffs in error:

Raby *vs.* Colchaur, 146 U. S., 153.

Johnson *vs.* Risk, 137 U. S., 300.

XIV Amendment.

IV.

As against the right of Carhart and Sully, trustee under mortgage executed, several points are made by "counsel for certain creditors" before mentioned, which were not fully considered in our original brief:

1. It is insisted that Carhart cannot claim a violation of the constitutional provision providing for the equal protection of the laws, because he was not within the jurisdiction of Tennessee.

Our insistence as to this is that the Carnegie Land Company was a foreign corporation, which having complied with the laws of Tennessee regulating the admission of such corporations into the State, which act declared such corporations, on compliance of certain terms, to be to all intents and purposes a domestic corporation, was within the juris-

diction of the State; and inasmuch as the rights of Carhart, mortgagee, to the security of the mortgage executed by said Carnegie Land Company depends upon the rights of said Carnegie Land Company, a solvent growing concern, to create said debt and to make said mortgage, and therefore as Carhart is in privity with said Carnegie Land Company, he has the right to make the question that the law which undertook to deprive him of his mortgage was a law which violated the Constitution of the United States as to the equal protection of the laws, in so far as it did deprive such corporations of the equal protection of the laws, such corporation being within the jurisdiction of the State of Tennessee. The question here is what right has Carhart and Sully, trustee, been deprived of as guaranteed to their vendor and through it to him under the Constitution of the United States? Said act being void as a violation of said provision of the Constitution as to their vendor, plaintiffs in error, Carhart and Sully, trustee, have the right, they being injured thereby, to have their right adjudicated in this court irrespective of said statute. We insist the following cases, by inference, support the above contention: Brown *vs.* Smart, 145 U. S., 454; Ludeling *vs.* Chafe, 143 U. S., 649. Perhaps the argument submitted in our original brief as to class legislation in this act is more appropriate under the provision of the Constitution providing for the equal protection of the laws rather than under due process of law; but while that is true, aside from the question as to whether plaintiffs in error are within the jurisdiction of Tennessee, we insist that there are certain attributes of classification under the statute which more particularly come within the due process of law guaranty, which may be involved and do not depend on whether plaintiffs in error are citizens of the State of Tennessee, and which are treated in our original brief under the head of "due process of law." As has been said, "a law depriving all persons of a certain form of liberty, or freedom, or contract, &c., would be equal, but the

same would not be constitutional under the due process of law clause."

Guthrie on XIV Amend. to the Con., p. 109.

VII.

It will be observed that the authorities cited by counsel as to insolvent laws have no application to a case of this kind, wherein is involved the constitutional right of parties to make and to take mortgages, the mortgagee being a solvent and going concern. Cases as to the laws regulating insolvents and also as to the regulation of public corporations such as railroads and the payment of employés, where the safety and welfare of the State are involved through a public corporation, have no application to this case. Neither does the regulation of insurance policies, 172 U. S., 562, where the said regulations apply equally to domestic and foreign insurance companies and are reasonable and appropriate as regulations and not oppressive or discriminatory, affect the question here presented. Nor do the mechanic lien cases, such as that in 101 U. S., 443, cited, nor the regulation of railroads, which are public trusts in their nature for the protection of those damaged in person or property in the actual operation of the same, to the benefit of the mortgage or protection of the pledge, affect the doctrine which we contend for, as to the infringement upon the right of contract of a private corporation in this State. Great reliance is placed by counsel on the case in 113 U. S., 515, as to lien for water rents having priority over mortgages, but while it is stated in this case by this court that the mortgagee takes notice of the law existing at the time the mortgage is taken, the decision nevertheless is placed upon the ground that the water rents are for the benefit of the common pledge in the same way as the mechanic's lien. As to taking notice of the law which undertakes to make unconstitutional regulations of the rights of parties, that was distinctly repudiated in the case of Blake

vs. McClung, the court saying that citizens of other States were not precluded because they contracted with notice of the law which gave Tennessee creditors an immunity and privilege not granted to them.

It is contended by opposing counsel that in the event Carhart succeeds and the Travelers' Insurance Company fails in securing priority for their mortgages, Tennessee creditors are still entitled to priority over Carhart's mortgage because said mortgage on the hotel property was taken subject to the Travelers' Insurance Company's mortgage. We insist that it is mere sophistry to say that the act, unconstitutional as to Carhart's mortgage, is yet effective so as to deprive him of it by virtue of the self-same act. The situation is this, as we see it: Carhart's lien is good against everybody, if the act is unconstitutional, because:

1. The Tennessee creditors lose their priority under the act.

2. The Travelers' Insurance Company in such an event, and if the act is good as to it, has no right it can make effective in this case and in this court as against Tennessee creditors or Carhart.

It is the same as if the Travelers' Insurance Company's mortgage were invalid or paid off and discharged so far as every one in this court is concerned. Certainly the Tennessee creditors cannot hold up the Travelers' Insurance Company's mortgage as a shield against Carhart's rights when said mortgage is dead in its owner's hands.

Respectfully submitted.

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